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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

denied

315-873

No. 972

DAVID O'BRIEN,

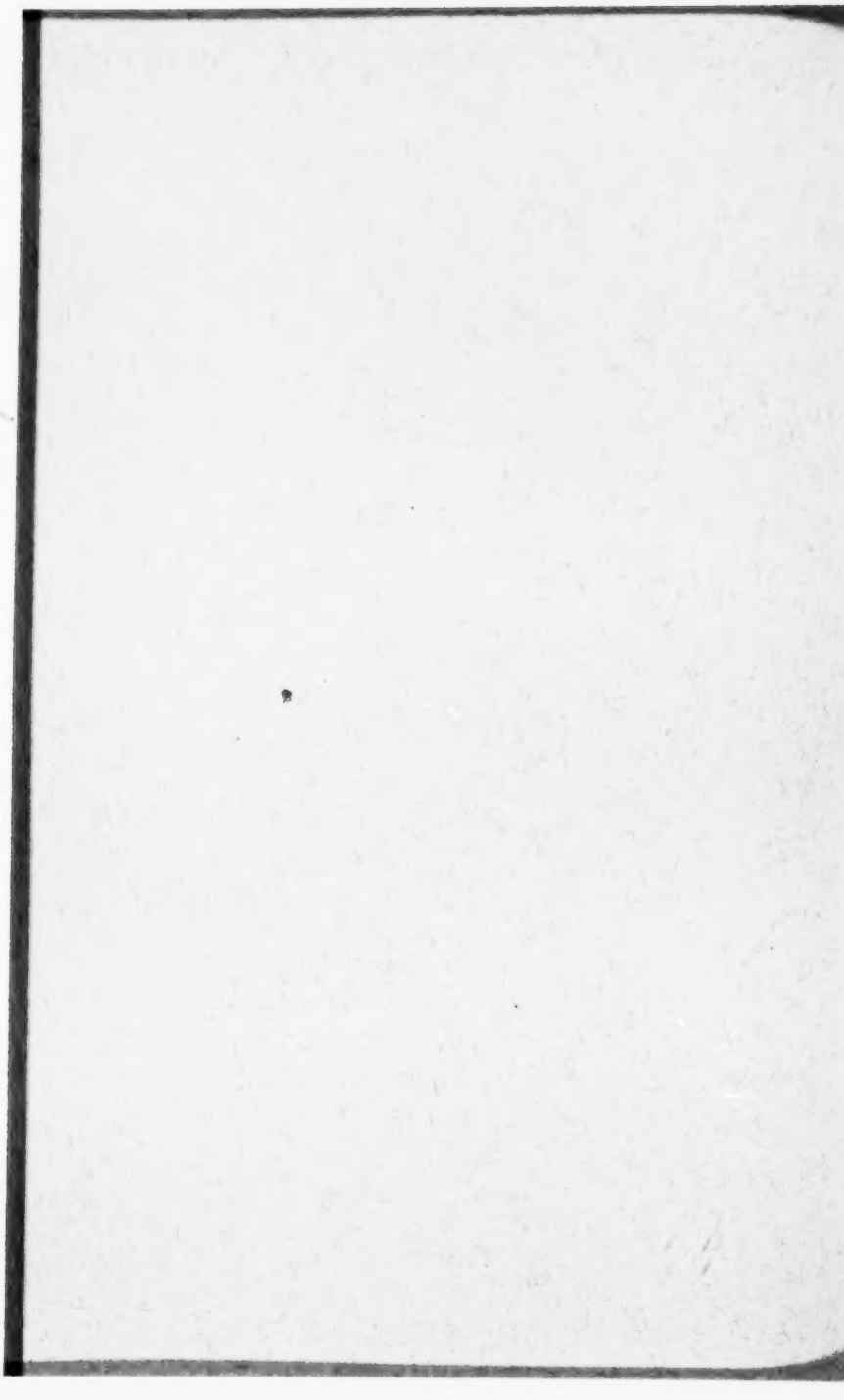
Petitioner,

vs.

PABST SALES COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ROBERT G. STOREY,
Counsel for Petitioner.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 972

DAVID O'BRIEN,

Petitioner,

vs.

PABST SALES COMPANY.

PETITION.

To the Honorable, the Supreme Court of the United States:

Comes now David O'Brien, hereinafter styled Petitioner, and, applying for writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, respectfully shows:

Statement of the Case.

This suit involves an invasion of Petitioner's right of privacy by the alleged unauthorized use by Respondent of Petitioner's photograph in connection with a football calendar which Respondent published and distributed for commercial purposes (R. 37). Petitioner David O'Brien, according to the undisputed record, was the outstanding college football player for the 1938 season. The football calendar, which was attached to Petitioner's original pleading, discloses that his favorite picture was used in the upper

left hand corner of the calendar, and in the right hand corner, a picture of Pabst Blue Ribbon Beer, both in the can and the bottle, were shown and exhibited by name. In the middle of the calendar was Grantland Rice's All American Team for 1938, which included the picture and name of David O'Brien, the Petitioner. The undisputed evidence disclosed that over 30,000 of such calendars were distributed in forty-one states of the United States, without the consent of David O'Brien. Upon the conclusion of the trial in the trial court, at which Appellant could not be present because he was engaged in training work with the Federal Bureau of Investigation, the trial court instructed verdict in favor of Respondent, assigning as reasons (R. 62 to 64) that Petitioner was such an outstanding public character that there could not be any invasion of privacy in the use of his name and photograph. This judgment was affirmed by the Circuit Court of Appeals on December 4, 1941, by a divided Court, with Mr. Justice Holmes dissenting. A motion for rehearing was duly filed, which was by the Circuit Court of Appeals overruled on January 2, 1942, without a written opinion.

Statement as to Jurisdiction.

Jurisdiction is conferred upon the Supreme Court by Section 347, 28 U. S. C. A. The opinion of the Circuit Court of Appeals is found at page 68 of the Record.

Questions Presented.

I.

Petitioner's right of privacy has been invaded by the unauthorized use of his photograph, and is therefore compensable.

II.

Respondent does not have the right, without authority, to appropriate the photograph and name of Petitioner for

COMMERCIAL PURPOSES, even though Petitioner is a widely publicized football player.

Reasons Relied On for Allowance of Writ.

I.

The opinion of the Honorable Circuit Court of Appeals was by a divided Court, Mr. Justice Holmes dissenting. Since the Court was divided in its opinion, it shows a doubt about the law, and this Honorable Court should take jurisdiction.

II.

The calendar in question shows clearly an implied endorsement of the product by Petitioner, without his consent. The Honorable Circuit Court of Appeals failed to decide this issue.

III.

In the majority opinion, the Court was in error in holding that no case of invasion of the right of privacy was pleaded or proved.

WHEREFORE, Petitioner prays that a writ of certiorari issue to the Honorable United States Circuit Court of Appeals for the Fifth Circuit, commanding it to certify to the Supreme Court, for its review and determination on a day certain, a full and complete transcript of the record and proceedings in cause numbered and entitled on the docket, No. 9892, David O'Brien v. Pabst Sales Company, and that the judgment of the Circuit Court of Appeals and the District Court be reversed; and that Petitioner have such other and further relief in the premises as this Court may deem proper.

Respectfully submitted,

ROBERT G. STOREY,
Attorney for Petitioner.